In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-481

ARK-MO. FARMS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. In connection with the construction of a lock and dam for the Arkansas River Project, the United States brought this condemnation proceeding to acquire flowage easements over 1,947.13 acres and the fee of 13.06 acres of petitioner's approximately 10,000-acre farm.

The government's appraisers testified that the value of the interests taken ranged from $110,000 to $116,000 (Pet. App. 13). Petitioner argued that the government's project would flood 4,000 acres beyond those described in the declaration of taking. The district court, over the government's objection, admitted testimony of alleged additional flooding as proof of

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"severance damages." On the basis of this testimony, the petitioner introduced valuation testimony ranging from $1,184,195 to $1,500,000. The jury rendered a verdict for $976,071, upon which judgment was entered (Pet. App. 12, 13).

The court of appeals reversed the judgment of the district court and remanded the case for a new trial with the direction that the "award shall be limited to the damages caused to that portion of the property which is included in the declaration of taking, plus incidental damages, if any, caused by that taking to the remainder. It may not include damages to the remainder of the property which as a result of flooding was alleged to have been taken." (Pet. App. 15–16.)

2. The decision is correct and presents no conflict with a decision of this Court or any court of appeals and no question warranting review by this Court. It is axiomatic in federal eminent domain proceedings that a district court lacks power to enlarge its jurisdiction to compensate for property allegedly taken but not listed as such in the government's declaration of taking. *Berman* v. *Parker*, 348 U.S. 26, 35–36; *Sweet* v. *Rechel*, 159 U.S. 380, 395; *Wilson* v. *United States*, 350 F. 2d 901 (C.A. 10); *United States* v. *Brondum*, 272 F. 2d 642 (C.A. 5); *Bumpus* v. *United States*, 325 F. 2d 264, 266 (C.A. 10); *Burkhart* v. *United States*, 227 F. 2d 659 (C.A. 9); *United States* v. *Sunset Cemetery Co.*, 132 F. 2d 163 (C.A. 7); *United States* v. *64.88 Acres of Land, etc.* (*Chubb*),

244 F. 2d 534 (C.A. 3); *New York Telephone Co.* v. *United States*, 136 F. 2d 87 (C.A. 2).

The opinion of the court of appeals, on which we rely, correctly perceived that the issue of severance damages is an entirely different matter from payment for an additional taking beyond that described in the complaint and declaration of taking. Consonant with the Fifth Amendment's requirement that the United States pay just compensation when it takes private property for public use, is the corollary that when there is a partial taking of a tract the measure of just compensation is not limited to the value of the part taken, but also includes any depreciation in the value of the remainder resulting from such partial taking. *Bauman* v. *Ross*, 167 U.S. 548, 574. The diminution in value is frequently referred to as severance damages.[1] Petitioner confuses the difference between an attempt to increase the extent of the property taken (which is not permissible in the condemnation suit) and the right to show diminution in the value of the remainder (which is permissible). See *Boyd* v. *United States*, 222 F. 2d 493 (C.A. 8). Any claim that the government has taken more land than that specified in the declaration of taking must, as the court below held (Pet. App. 15), be the subject of a separate

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[1] *Sharp* v. *United States*, 191 U.S. 341, 351-352, 354; *United States* v. *Miller*, 317 U.S. 369, 375, 376. See also *United States* v. *Fort Smith River Devel. Corp.* 349 F. 2d 522 (C.A. 8); *United States* v. *Crance*, 341 F. 2d 161 (C.A. 8), certiorari denied, 382 U.S. 815.

action in the Court of Claims under the Tucker Act, 28 U.S.C. 1491.[2]

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SHIRO KASHIWA,
Assistant Attorney General.
EDMUND B. CLARK,
JACQUES B. GELLIN,
Attorneys.

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[2] 33 U.S.C. 702(c) relieves the United States from tort liability caused by flood control works, but does not, as petitioner suggests, bar suit under the Tucker Act or otherwise purport to immunize the United States from paying just compensation for property taken within the meaning of the Fifth Amendment.

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